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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 224

THE UNITED STATES,

Petitioner,

v.

PROVIDENT TRUST COMPANY, as Administrator of the Estate of GEORGE THEODORE ROBERTS, Deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is reported in 2 F. Supp. 472.

JURISDICTION

The judgment of the Court of Claims was entered April 10, 1933. The petition for a writ of certiorari was filed July 1, 1933. The jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936.

STATEMENT OF THE CASE

The petitioner's statement of facts is accurate. It omits, however, certain findings of the Court of Claims which, because they may be of material importance, are summarized as follows:

The testator's daughter, Elizabeth Wentworth Roberts, consulted the gynecologist upon the direction of her attending physician. The operation and removal of the uterus with the tumor, the Fallopian tubes, and both ovaries were necessary to prevent further impairment of her health. (R. 5.)

QUESTION PRESENTED

Whether the testamentary provision making the charitable bequests and devises contingent upon the life beneficiary's death without issue should defeat the deduction, otherwise clearly authorized by section 403 (a) (3) of the Revenue Act of 1918, of the value of such bequests and devises when a surgical operation, essential to the protection of the life beneficiary's health and performed several years before the testator's death, had destroyed all possibility of issue and made the bequests and devises of the property to the charitable organizations a certainty.

Statute and Regulations Involved

The statute and regulations involved appear in the Appendix, *infra*, pp. 8-9.

Argument

The decision in this case turns entirely upon the admissibility of evidence. The United States contends for a medieval and artificial rule which would exclude that evidence while the claimant contends for facts as they actually exist.

The petitioner tacitly admits that the evidence of the removal of the reproductive organs conclusively establishes *in fact* that the life tenant, upon whose death without issue the charitable bequests were dependent, could not have become pregnant nor borne issue, but urges that the authorities do not permit of a consideration of such evidence regardless of its character or the circumstances under which it is offered. It is submitted that the prevailing judicial view, as expressed in the cases cited by petitioner, is not inconsistent with the consideration of the evidence in the case at bar.

None of the reasons, aggregating four in number, advanced for excluding evidence of incapacity in the decisions relied upon by the petitioner are applicable to the instant case. Let us consider each of these reasons.

First, it has been said, as in *Hill* v. *Sangamon Loan and Trust Company*, 295 Ill. 619, 621, 622, that the impossibility of fixing any particular age when repro-

ductive capacity ceases makes the determination of incapacity from age (and the physiological changes related to age) too conjectural and unreliable to permit of evidence of that character. Even the court which so declared has, however, indicated that other evidence of definite character may establish incapacity. In *Hill* v. *Spencer*, 196 Ill. 65, 70, the Supreme Court of Illinois said:

> "The allegation that Martha Hill is past the time of life to have children is meaningless, as she is, in law, presumed to be capable of bearing children as long as she lives, *unless more than a mere matter of age is stated in the bill.*" (Italics ours.)

But in the present case the evidence does not involve age nor related physiological change; incapacity is established beyond conjecture or doubt.

Second, it has been suggested, as in *List* v. *Rodney et al.*, 83 Pa. 483, that "the indelicacy of the acts to which such an inquiry might lead" justifies the exclusion of evidence of physiological change. But there is no indelicacy in admitting evidence of the instant character.

Third, it has been stated that, if evidence of incapacity were admitted, "surgical operations might be resorted to to make it absolutely certain that no issue could be born." *Hill* v. *Sangamon Loan and Trust Company*, 295 Ill. 619. The reason is inapplicable here. It is practically inconceivable that there could have been any circumstance to cause the patient, the

surgeon, or the fourteen charitable organizations to participate in an improper operation of this nature. The operation was performed, not in violation of public morals, but to preserve the patient's health.

Fourth, the exclusion of evidence of incapacity has sometimes been supported by the statement that its admission would promote uncertainty in property titles. *Farrington* v. *Commissioner*, 13 B. T. A. 274. But law, which presumes death after an unexplained absence of seven years (17 Corpus Juris 1167) and directs the administration of the absentee's estate (23 Corpus Juris 1007, 1008) is hardly so incongruous as to fear a confusion of titles where, as here, incapacity is conclusively proved, where the incapacitated individual has died without issue before the litigation is commenced, and where the question of title to property is in no respect involved.

But the decisions cited to support the petitioner's position are inadequate for the purpose, not alone in the inapplicability of the reasons set forth in the opinions to the circumstances of the case at bar, but also in the important differences between the vital facts in those cases and the facts in the instant proceeding. In all but two of the cases cited for the petitioner there was involved in connection with the evidence of incapacity the question of the title or interest in property, and in all but one of the cases the evidence was confined to age with supporting testimony in a few instances of related physiological change. Thus with the two exceptions noted (to be considered presently), the facts are distinguishable from those in this case on matters of controlling importance.

One of the two exceptions is the decision in *Farrington* v. *Commissioner of Internal Revenue*, 30 F. (2d) 915, the decision chiefly commented upon by the petitioner. In that case the evidence was limited to age and the occurrence of the menopause, and one of the expert witnesses for the petitioner admitted that in rare instances women had given birth to children under similar circumstances. Hence, although admittedly some of the statements in the majority opinion of the court conflict with certain statements of the Court of Claims in this proceeding, the cases are readily distinguishable on the facts.

The other exception referred to above is the decision of the United States Board of Tax Appeals in *Guaranty Trust Co.* v. *Commissioner of Internal Revenue*, 27 B. T. A. —, decided January 31, 1933. There was no evidence that the operation was necessary to preserve the patient's health and the life tenant *had not died without issue* as here, but in other respects the facts were virtually the same as here. It is submitted that the decision is not sound. The case is now on appeal to the United States Circuit Court of Appeals for the Second Circuit.

Affirmatively, the following United States decisions support the admissibility of evidence on incapacity. *Male* v. *Williams*, 48 N. J. Eq. 33; *Whitney* v. *Groo*, 40 App. D. C. 496; *Johnson* v. *Beauchamp*, 5 Dana (Ky.) 70; *Gowen's Appeal*, 106 Pa. 288; *Bacot* v. *Fessenden*, 130 App. Div. (N. Y.) 819. In none of those cases were the facts as compelling for the admission of evidence of incapacity as here. These decisions are, therefore, authoritative support for the decision below. In addition there are numer-

ous English decisions admitting evidence of this character. *Mackenzie* v. *King*, 17 L. J. Ch. N. S. 448; *In re White* (1901), 1 Ch. 570, and cases therein cited.

Conclusion

It is the purpose of the statute to encourage charitable bequests (*Edwards* v. *Slocum*, 264 U. S. 61); and to require no more certainty in the evidence of value than is generally found in "human affairs" (*Ithaca Trust Company* v. *United States*, 279 U. S. 151). The decision below conforms to those purposes and is in harmony with the weight of authority. The petition for certiorari should be denied.

Respectfully submitted,

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August, 1933.

APPENDIX

Section 403 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1098-1099, provides in part as follows:

> That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> * * * * *
>
> (3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. * * *

Treasury Regulations 37 provide in part as follows:

> ART. 53. *Public, charitable, and similar bequests.*—Bequests to religious, charitable, scientific, literary, or educational corporations are deductible only if the corporation is organized or operated exclusively for one of the purposes specified (see Art. 54). Similarly, in the case of a trust, the trust must be exclusively for such purposes. It does not prevent deduction, however, that the property placed

in trust is also subject to another trust for a private purpose. Thus, where money or property is placed in trust to pay the income to an individual during life, and then to pay or deliver the same to a charitable corporation, or apply the principal to a charitable purpose, the charitable bequest or devise forms the basis for a deduction. The amount of the deduction, in such case, is the value, at the date of the decedent's death, of the remainder interest in the money or property which is devised or bequeathed to charity. For the manner of determining the value of such remainder interest, see Article 20. Gifts made in the decedent's lifetime are deductible only if made in contemplation of death, or intended to take effect at or after death, and the property is consequently included in the gross estate. Gifts made in satisfaction of a legacy are also deductible. The deduction is not limited in the case of the estates of residents to bequests to domestic corporations or to trustees for use within the United States.

ART. 56. *Conditional bequests.*—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed.